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IN THE

Supreme Court of the United States

October Term, 1968
No. 796

THE DREDGE CORPORATION, a Nevada Corporation,
Petitioner,

vs.

J. RUSSELL PENNY, etc.,
Respondent.

THE DREDGE CORPORATION, a Nevada Corporation,
Petitioner,

vs.

E. J. PALMER, etc.,
Respondent.

REPLY TO THE BRIEF FOR FEDERAL OFFICERS IN OPPOSITION.

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Statement.

The Department of the Interior, through its attorneys have filed a brief in opposition to our petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit in the above cases.

This reply is an answer to the points raised in said brief in opposition.

ARGUMENT.

1. The Department of the Interior states in its brief in opposition (page 3, paragraph 1):

> "Petitioner's contention that use of the 'present marketability' test in connection with the 'prudent man' standard is invalid because the former test was never published in the Federal Register (Pet. 4-6) is an attempt to relitigate issues settled last Term in *Coleman.*"

Petitioner is not attempting to relitigate the issues in *Coleman.*

The *Coleman* case grew out of an eviction suit filed Aug. 8, 1963 and a cross-complaint thereto asking for judicial review of administrative proceedings.

Dredge Corporation's complaint in Case #366 *was filed February 3, 1961,* and its complaint in Case #396 *was filed September 8, 1961.*

Both of these Dredge cases are for judicial review after all administrative remedies had been exhausted.

Therefore, Dredge Corporation's two cases were filed before the *Coleman* case was started. We are following our judicial remedies and have no connection with the *Coleman* case.

This Court in *Coleman* said that the "marketability at a profit" test was a logical complement to the "prudent man" test. This Court did not rule on whether the "marketability at a profit" test ***had been published*** in the Federal Register, as required by the Administrative Procedure Act, (5 U.S.C. 552) or if this test was legal under the present circumstances, of not having been published.

The issue of the requirement to publish in the Federal Register was never raised in the *Coleman* case on appeal and therefore this point has not been ruled on by this Court in *Coleman*.

No judgment can go beyond the issues in the case, therefore, to deny Dredge Corporation the right to have this issue determined by this Court would be a denial of due process of law.

2. The Department of the Interior in its brief in opposition states (page 3, paragraph 1):

> "As was shown in the Coleman argument the 'present marketability' test has been applied for nearly four decades . . ."

The facts and court decisions do not sustain that statement.

The "prudent man" test in use since 1894 has been approved by the Supreme Court of the United States several times, one of the latest decisions being *Best v. Humboldt Mining Company,* 371 U.S. 334 (January 4, 1963). There is no reference in that decision by this Court to "marketability at a profit."

The Department of the Interior *admits* in its brief in opposition (on page 4) that the test of marketability at a profit had never been published in the Federal Register.

> "That is, the test is a permissible administrative interpretation and application of the statutory requirement of 'valuable mineral deposits' and hence is not required to be stated in the Federal Register by the Administrative Procedure Act, 5 U.S.C. 552."

Petitioner suggests that this *additional* requirement of "marketability at a profit" without being spelled out by a regulation, properly published in the Federal Register, is an attempt by the Department of the Interior to administratively destroy petitioner's rights to its mining claims—contrary to the Constitution. To add administratively imposed non-statutory requirements to the mining laws is contrary to law and justice.

The Department of the Interior in its brief in opposition states (page 4, paragraph 2):

> "In the exercise of its plenary authority over the public domain, Congress has delegated broad authority to the Secretary of the Interior to implement its policy as to disposal of such lands. *Best v. Humboldt Mining Co.*, 371 U.S. 334; *Boesche v. Udall*, 373 U.S. 472. The standards he has adopted are consistent with the congressional scheme and *sufficiently precise to inform administrative judgment* and enable meaningful judicial review. *No more is or could be required.*" (Emphasis added).

The standards adopted by the Department of the Interior may be sufficient to inform "administrative judgment" but the Administrative Procedure Act requires more. It requires that the *public* shall be informed and that the Department *must publish* its intentions in the Federal Register so those opposed may have an opportunity to object. This is the only way that abuse of administrative authority can be curbed and is one of the principal reasons for enactment of the Administrative Procedure Act.

The Department of the Interior has acknowledged in administrative decisions that the Administrative Procedure Act applies to cases involving that Department. In *United States v. Heirs of John D. Stack, et al.,* A-28157 (March 28, 1960), it was held:

> "The Administrative Procedure Act is binding upon the Department of the Interior in proceedings covered by its provisions unless and until it is repealed or superseded by further legislative action or invalidated by a court of law."

In *United States v. E. M. Johnson, et al.,* A-30191 (April 2, 1965), the Department held:

> "Although Departmental decisions may be included in the volumes published as Decisions of the Department of the Interior, they may be cited as precedents in proceedings under the Administrative Procedure Act since they are available for public inspection pursuant to published Departmental regulations, which is in accordance with Section 3 of that Act."

For what reason does the Department of the Interior refuse to follow the law and comply with the provisions of the Administrative Procedure Act, requiring *publication of an intended regulation.*

Does the Department feel that its activities would be limited if it is required to inform the public of its requirements in the location and patenting of mining claims?

Can it be considered proper and fair for the Department to operate unchecked except by its own conscience and follow standards that are "sufficiently precise to

inform administrative judgment" but not to inform the public?

Mining claims have been held by this Court to be "property in the fullest sense of the term" (*Emil L. Krushnic v. United States,* 380 U.S. 305 (1930).) Can property rights be thus destroyed by "administrative judgment" without compensation to the owner?

What *is* required to comply with the requirements of the Department of the Interior; what requirements are in effect today and what will be changed by tomorrow, without knowledge to the public or the mine owner?

This is the reason for the requirement of publication by the Administrative Procedure Act *so the public may know* what is required to successfully hold title to mining claims.

The United States Court of Appeals for the District of Columbia struck down the District of Columbia's general vagrancy law and narcotic vagrancy law in the case of *Hattie Mae Ricks,* as yet unreported.

In reversing the conviction under a narcotics and vagrancy charge, the Appeals Court opinion, written by Judge Spottswood W. Robinson, said

> "each of the statutory provisions upon which appellant's conviction rests as so vague as to infringe rights secured by the Fifth Amendment.
>
> 'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violated the first essential of the due process of law,' Judge Robinson said.
>
> This rule applies to the test of 'Marketability at a profit.' "

3. The Department of the Interior states in its brief (page 4, paragraph 3):

> "3. There is nothing in proceedings below to indicate that the Common Varieties Act of 1955, as amended 69 Stat. 368, 30 U.S.C. 611, was applied retroactively in this case."

The consolidated decision of the Secretary of the Interior in the case of Clear Gravel Corporation and the Dredge Corporation, dated December 29, 1959, states as follows (page 4, paragraph 1):

> "As to claims located for sand and gravel, discovery, including marketability, must be demonstrated prior to withdrawal of the land from location for the common varieties of sand and gravel effected by the Act of July 23, 1955" (50 U.S.C. 1958, Sec. 601, *et seq.*).

If the Dredge mining claims are saved from the provisions of the above Act by its own terms, that said Act applies only to claims "hereafter located," why is discovery limited to before the Act was passed—why not after? Why mention the Act at all if it does not apply, by its terms, to these claims?

Conclusion.

For these reasons petitioner respectfully requests that its petition for a writ of certorari be granted.

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